82-532

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SEP 25 1982
ALEXANDER L. STEVAS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-

EUGENE B. WEISS,

Petitioner,

v.

ROBERT C. LEHMAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a victim of a federal official's intentional tort in violation Fifth Amendment rights may be precluded from a due process claim under the Constitution because of the existence of another federal remedy which this Court found in Carlson v. Green was not an adequate alternative remedy?

2. Whether the destruction of plaintiff's property based on a deliberate pre-deprivation decision which the jury found to be unreasonably wrong is the type of random and unauthorized act which justifies the lack of a pre-deprivation hearing under Parratt v. Taylor?

3. Whether the requirement that plaintiff prove not only intentional destruction of plaintiff's property but also intentional destruction of plaintiff's property interest conflicts with this Court's rejection of the subjective test in Harlow v. Fitzgerald and its decision that an official may be found liable where he could be expected to know that certain conduct would violate statutory or constitutional rights?

PARTIES TO THE PROCEEDINGS

1. Petitioner is Eugene B. Weiss, Mr. Weiss was the Plaintiff in the District Court and Appellee in the Court of Appeals for the Ninth Circuit.

2. Respondent Robert C. Lehman was a Defendant in the District Court and Appellant in the Court of Appeals for the Ninth Circuit.

3. Wayne LaRue who was a Defendant in the District Court was not a party to this Petition.

TABLE OF CONTENTS

QUESTION PRESENTED..... i

PARTIES TO THE PROCEEDINGS..... ii

OPINIONS AND JUDGMENTS BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS, STATUTES and REGULATIONS..... 2

STATEMENT OF THE CASE..... 4

REASONS FOR GRANTING THE WRIT..... 8

CONCLUSION..... 12

APPENDIX..... 1a

TABLE OF AUTHORITY

Cases:

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)..... 8,9
Carlson v. Green, 446 U.S. 14 (1980)..... 8,9
Harlow v. Fitzgerald, 50 L.W. 4815 (1982)..... 11
Parratt v. Taylor, 451 U.S. 527 (1981)..... passim

United States Constitution:

Fifth Amendment..... 8,9
Seventh Amendment

Statutes:

28 U.S.C. §2671 et seq..... 8,9
42 U.S.C. §1983..... 8,10

Neb. Rev. Stat. §81-8, 209 et seq... 9

Federal Regulations:

36 C.F.R. 261.16

Miscellaneous:

Forest Service Manual, §5335.01b
Forest Service Handbook, §2811.5-3b, §2706-9

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PETITION FOR A WRIT OF CERTIORARI

Eugene B. Weiss petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals was entered May 12, 1982. It is reported at 676 F.2d 2019 and appears on p. 1a of the Appendix.

The Order of the Ninth Circuit Court of Appeals denying a Motion for Rehearing

was entered June 28, 1982. It appears on p. 15a of the Appendix.

The Order remanding the case to the Ninth Circuit Court of Appeals was entered October 5, 1981. It appears on p. 17a of the Appendix.

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered on January 26, 1981, and appears at p. 18a of the Appendix to this Petition. It is reported at 642 F.2d 265.

The Judgment of the United States District Court for the District of Idaho, entered on July 15, 1978, upon a jury verdict of July 14, 1978, appears at p. 24a of the Appendix; the verdict form appears at p. 25a. There is no reported decision of the District Court.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 12, 1982. The Order denying a Motion for Rehearing was entered June 28, 1982. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES and REGULATIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private

property be taken for public use, without just compensation."

The Seventh Amendment to the United States Constitution provides in pertinent part:

"[No] fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the Rules of the Common Law."

Title 28, U.S.C. §2674 in relevant part provides:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

Title 28 U.S.C. §2680(a) provides:

"The provisions of this chapter and section 1346(b) of this title shall not apply to -
(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a

federal agency or an employee of the Government, whether or not the discretion involved be abused."

36 CFR 261.16, See Appendix, p. 29a

Forest Service Handbook Title 2800, §2811.5-36, see Appendix, p. 28a.

STATEMENT OF THE CASE

Plaintiff brought this action against two Forest Service employees for destruction of Plaintiff's personal property in violation of his Fifth Amendment rights. Jurisdiction was based on 28 U.S.C. § 1331.

The case was tried to a jury in Federal District Court. The jury rendered a verdict in favor of the Plaintiff against Defendant Lehman and the Defendant appealed. The Ninth Circuit Court Of Appeals upheld the judgment entered by the district court. Defendant filed a Petition for Writ of Certiorari. This Court remanded the case for further consideration in light of Parratt v. Taylor, 451 U.S. 527, (1981). The Ninth Circuit Court Of Appeals vacated and remanded the case for further proceedings consistent with its opinion.

Plaintiff's property was located on a valid mining claim owned by three other individuals. The owners had leased the mine claim to Continental Rare Metals from

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1 In the original Complaint jurisdiction was based on 28 U.S.C. § 1332; the Complaint was later amended.

about 1961 to 1968. (Tr.Tr. I. at 145). Plaintiff had built the dredge for the lessee's mining operation. (Tr.Tr. I. at 96). At the termination of the lease, the Lessees had sixty days to remove any equipment; after expiration of that time the equipment left by the Lessee reverted to the mine owners. (Tr.Tr. I. at 99, 146). In 1970 the Plaintiff acquired the remaining equipment in trade for a lease on a dredge at another mining site. (Tr.Tr. I. at 100-101, 146).

In 1970 Plaintiff removed some of the equipment for use on other mining operations. (Tr.Tr. I. at 84). In 1971 the road was barricaded in an attempt by the forest service to close the road. The road was then almost impassable and prevented Plaintiff from removing property from the mining claim. (Tr.Tr. I. at 12-13, 88, 194). There were constant negotiations between the mine claimants and the Forest Service to obtain a reopening of the road. (Tr.Tr. I. at 113, 136, 205-206).

In 1973 Defendant Lehman who was manager of the local Forest Service Ranger Station drew up a work plan to dispose of the property located on the mining claim and reseed the area to return it to its natural condition. The plan included the burning of buildings and burying equipment. (Tr.Tr. I. 22-23). Defendant and other Forest Service employees under his direction carried out the plan. There was conflicting testimony at trial regarding the property and the value of the property which was destroyed. Plaintiff introduced evidence including photographs and the

testimony of several witnesses that the property included valuable mining equipment and parts. (Tr.Tr. I. 124-132). Several items of equipment were destroyed, some were buried, a building containing various items was burned (Tr.Tr. I. at 105, 114, 116), and smaller items including nuts and bolts and steel jig shot were scattered. (Tr.Tr. I. 188, 196). A motor was run over by a bulldozer and was badly damaged. (Tr.Tr. I. 124, 196). The Defendant testified that the property destroyed and buried consisted mainly of collapsed bus bodies, an old refrigerator, barrels and stoves, all of which he characterized as junk. (Tr.Tr. I. at 15-16).

Plaintiff and his son testified of the intended use of the metal and parts, and various other items in another mining operation nearby. (Tr.Tr. I. at 84-91, 117, 186-190). Both the Plaintiff and a used equipment dealer testified regarding the value of the property which was destroyed. (Tr.Tr. I. 242-244, 354-361).

After the bulldozer work was done at the mining claim the road was barricaded and a 20-25 foot culvert which had been put in by the Lessees on the claim (Tr.Tr. I. at 139) was removed and taken to the Ranger Station. (Tr.Tr. I. at 35-36). The road was then impassable by over-the-road vehicles.

Defendant did not give notice either to the Plaintiff or to the mine claim owners of the intended work project. Although the Defendant testified

that he did not know who owned the property at the time it was destroyed, he knew who owned the mine claim. His file contained correspondence from their attorney (Tr.Tr. II. at 519) as well as from the owners and lessees (Tr.Tr. I. at 26). He made no attempt to contact any of these persons regarding the destruction of the property. (Tr.Tr. I. at 30).

Although Defendant was aware that Forest Service regulations required publishing and posting notice where there was a question as to ownership of property and required impounding the property for a period of time before disposing of it, Defendant did not follow such procedures. (Tr.Tr. I. at 29-30, 35).

The jury was instructed that the Plaintiff had the burden of proving that Defendant destroyed the property intentionally (Jury Inst. 19), knowingly and without taking appropriate steps to ascertain and notify the owner and of proving that the property was valuable, (Jury Inst. 22). The jury was also instructed that Defendant was protected by qualified immunity and that they should find for the Defendant if they found that: (1) He was acting within the scope of his duty, (2) He had reasonable grounds to believe his actions were appropriate, and (3) He acted in good faith. (Jury Inst. 25).

The jury returned a verdict against the Defendant and in favor of the Plaintiff for $1,000.

REASONS FOR GRANTING THE WRIT

I

THE COURT OF APPEALS' APPLICATION OF PARRATT v. TAYLOR CONFLICTS WITH THE DECISION OF THIS COURT IN CARLSON v. GREEN AND BIVENS v. SIX UNKNOWN FED. NARCOTICS AGENTS ON AN IMPORTANT CONSTITUTIONAL ISSUE.

The Court decided in Parratt v. Taylor, 451 U.S. 527 (1981), that a fully adequate state remedy precluded a Plaintiff from bringing an action under 42 U.S.C. §1983 against a prison official for the negligent loss of property by the defendant's subordinate. The case to which the court of appeals applied Parratt involves a totally different question: Should a victim of a federal official's intentional tort in violation of the victim's Fifth Amendment rights be precluded from one federal remedy because of the existence of another federal remedy which this Court found in Carlson v. Green, 446 U.S. 14 (1980) was not an adequate remedy.

The Court in Carlson pointed out that an action under the FTCA exists only if the state in which the alleged offense took place would permit a cause of action.

Under the FTCA recovery is only permitted against an official where recovery could be had against a private individual under like circumstances. 28 U.S.C. §2674. In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) where defendants argued that there was an

adequate remedy in tort under state law, the Court responded that to treat the relationship between the citizen and the federal agent as no different from that between two private citizens is to ignore the fact that the agent acting in the name of the United States has a far greater capacity for harm than an individual acting without authority.

In Parratt the Court found that Nebraska's laws provided for redress for injury by state officials.[2] In contrast the Federal Tort Claims Act is not a federal remedial scheme at all. It is merely a waiver of soverign immunity that permits a claimant to attempt to recover against the United States "under the vagaries of state law." Carlson v. Green, supra at 1477, n.1.(concurring opinion). No "process" has been provided at all. As stated in the dissent by Judge Boochever on appeal, "The availability of a FTCA Remedy, as 'a parallel complementary' alternative to a Bivens action, Carlson 446 U.S. 20, 100 S.Ct 1472, does not make Lehman's conduct any less of a violation of Weiss's Fifth Amendment Rights."

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2 The Neb. Tort Claims Act set out a procedure whereby persons can make claims to the State Claims Board, an investigation is made and the Board can allow and settle the Tort claim; if it does not, the claimant may file a court action. See Neb. Rev. Stat. §81-8-209 et seq. (Reissue 1976).

II

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THIS COURT'S DECISION IN PARRATT .

In Parratt this Court was presented with the question of whether an action for negligence could be brought under 42 U.S.C. §1983 for deprivation of property without due process. The Court held that lack of pre-deprivation process was justified where such process was impracticable because the loss was caused by a random and unauthorized act as long as the State provided a remedy which would fully compensate the victim. In that case as the officials had no way of knowing in advance that the subordinates would mishandle the mail, it was impossible to provide pre-deprivation process. Here, Lehman, the supervising official, made a deliberate pre-deprivation decision, which the jury found to be unreasonably wrong, that the notice provisions should be dispensed with.

The appellate court has either ignored completely the fact finding role of the jury or has totally misapplied the principles set out in Parratt. The court found that it could not determine on the limited record whether a meaningful deprivation process was impractical. The court stated:

> "Since removal of mere debris, such as an old rusty car body thought to be here, based on the evidence in the

record, would appear to have been no more than a negligent oversight."

The characterization by the court of Defendant's conduct as no more than a negligent oversight ignores the findings of the jury. The jury was instructed that it could not find for the Plaintiff unless Defendant destroyed the property intentionally and without taking appropriate steps to notify the owner. Yet it was the judgment of the court of appeals that on remand plaintiff should be allowed to pursue a due process claim by showing "additional facts, such as an intentional destruction of his property interest, that would make the Parratt limitation inapplicable." The apparent distinction being made by the court is that it is not enough that Defendant intend to destroy the property; he must intend to destroy a property interest. This subjective requirement goes beyond any intent requirement in either civil or criminal law.

III

THE SUBJECTIVE ELEMENT REQUIRED BY THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH THE DECISION OF THIS COURT IN HARLOW v. FITZGERALD.

This Court recently decided in Harlow v. Fitzgerald, 50 L.W. 4815, June 24, 1982, in the context of an executive immunity question, that an objective rather than subjective test should be applied to determine the liability of officials. The Court held that government officials performing discretionary functions may be

liable for civil damages where their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 4820.

CONCLUSION

The Petition for Writ of Certiorari should be granted, and the Judgment below should be reversed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari was served upon all parties required to be served by depositing copies of same in the United States mail, first class, postage prepaid, addressed to:

Hon. Rex E. Lee
Solicitor General
Department of Justice
Washington, D. C. 20530

Mr. Steinmeyer
Ms. Katherine S. Gruenheck
Department of Justice
Civil Division, Room 3617
Washington, D. C. 20530

DATED this _____ day of September, 1982.

_____
Claude Marcus
Counsel for Petitioner